

2012 WL 10056899 (Me.Super.) (Trial Motion, Memorandum and Affidavit)  
Superior Court of Maine.  
Penobscot County

Evelyn L. SMAHA of Old Town, Penobscot County, State of Maine, Plaintiff,

v.

CATHERINE PHILLIPS OF WILTON, Franklin County, State of Maine and  
Jennifer Parady of Old Town, Penobscot County, State of Maine, Defendants.

No. BANSCV2010156.  
March 22, 2012.

**Memorandum of Points and Authorities in Support of Plaintiff Smaha's  
Opposition to Defendant Phillips' Motion for Summary Judgment**

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CIVIL ACTION:

NOW COMES Plaintiff Evelyn Smaha, by and through their undersigned counsel, David J. Van Dyke, Esquire, Hornblower Lynch Rabasco & Van Dyke, P.A., and hereby respectfully submit the following Memorandum of Points and Authorities in Opposition to Defendant Catherine Phillips' Motion for Summary Judgment, dated February 22, 2012<sup>1</sup>.

This case arises out of an assault upon Plaintiff Evelyn ("Evie") Smaha by Defendant Parady, while Evie was under the employ of and in premises overseen and supervised pursuant to power of attorney by Defendant Phillips.

Evie has provided a remarkably-detailed chronology of the events at the heart of this claim (*see* Answer to Interrogatory No. 9, pp. 4-25 of Plaintiff's answers to interrogatories herein, a true and correct copy of which is attached to the accompanying Affidavit of the undersigned).

Additionally, Evie has been deposed at length regarding the occurrence.

Her deposition testimony is essentially co-existent and entirely consistent with her answers to interrogatories.

Stripped to its essence, Evie asserts as follows:

At the time of the assault, Evie was taking care of Defendant Phillips' two **elderly** parents (Leon and Betty Parady), at the home of the **elderly** Paradys, as an employee of Defendant Phillips. Defendant Phillips ran the **elderly** Paradys' affairs through a broad power of attorney. Defendant Phillips knew that a former employee, Defendant's niece (co-Defendant) Jennifer Parady, represented a danger to Evie. Notwithstanding the foregoing, Defendant Phillips allowed Jennifer Parady to enter into, and remain, in the premises where Evie was working on the day of the assault.

While in the premises, Ms. Parady assaulted Evie.

Those factual assertions are sufficient to survive summary judgment and provide a controversy for which trial is necessary.

Evie submits together with this incorporated memorandum of points and authorities her Counter-Statement of Material Facts in Dispute (hereinafter “CSMFD”) and the accompanying affidavit of the undersigned, David J. Van Dyke, Esq.

### ***FACTUAL BACKGROUND***

The pertinent facts of this matter are very straight-forward:

At the time of the assault, Leon and Betty Parady were **elderly** people.

At the time of the assault, Defendant Phillips (the **elder** Paradys' daughter) maintained a power of attorney, by which authority she made decisions regarding the care of the **elderly** Paradys. Defendant Phillips' proposed Material Fact No. 3.

Evie was an employee of Defendant Phillips, caring for the **elder** Paradys in their home. Plaintiff Smaha's Counter-Statement of Material Facts in Dispute (hereinafter “CSMFD”) at para. 4.

Defendant Phillips knew prior to the incident that Jennifer Parady (Defendant Phillips' niece and the **elder** Paradys' granddaughter) was dangerous, and specifically posed a danger to Evie. CSMFD at para. 10.

Nevertheless, Defendant Phillips allowed Jennifer Parady to come upon the premises the day of the assault to conduct a yard sale. CSMFD at para. 11.

Defendant Phillips told Jennifer Parady that she was not allowed to enter the house while Evie was there that day. CSMFD at para. 12.

However, while Evie was working at the **elder** Paradys' home, Jennifer Parady came to the door of the residence and began screaming and pounding the door. Jennifer Parady's actions scared the **elder** Paradys and she had to be let in. CSMFD at para. 13.

Defendant Phillips did nothing to compel Jennifer Parady to leave the premises. Rather, she walked away when made aware that Jennifer Parady was in the premises where Plaintiff Smaha was working and did nothing to prevent a confrontation. CSMFD at para. 14.

The assault immediately ensued. CSMFD at para. 15.

### ***ARGUMENT***

#### ***1. The Applicable Legal Standard***

The Court is aware of the standard to be applied in consideration of a motion for summary judgment. Pursuant to Me. R. Civ. Procedure Rule 56, summary judgment may be granted only where no genuine issue of material fact exists and the moving party is entitled to judgment in its favor as a matter of law. *Kraul v. Maine Bonding and Casualty Company*, 672 A.2d 1107, 1109 (Me. 1996) (citing to Me. R. Civ. Procedure 56, 2 Field, McKusick & Roth, *Maine Civil Practice* Section 56.4 at 39 (2d edition 1970)) (hearing on summary judgment motion is “not in any sense a trial”); *Northeast Coating Technologies, Inc. vs. Vacuum Metalurgical Co., Ltd.*, 684 A.2d 1322, 1324 (Me. 1996).

The presence of genuine issues of material fact (as here) are necessarily fatal to a motion for summary judgment where (as here), the movant defendant is not otherwise entitled to judgment in their favor as a matter of law.

## 2. Defendant Catherine Phillips is Not Entitled to Summary Judgment

It is disputed whether Evie Smaha was (or was not) an employee of Defendant Phillips at the time of the assault. *See* CSMFD at para. 4.

Defendant Phillips knew that Jennifer Parady represented a peril to her employee. CSMFD at para. 10.

Defendant Phillips allowed Jennifer Parady to stay in Evie's workplace and made no effort to remove her when she entered. CSMFD at para. 13, 14.

The assault arose directly from Defendant Phillips' failure to remove Jennifer Parady from Evie's workplace. CSMFD at para. 15.

Insofar as Defendant Phillips was Evie's employer at the time of the assault, Maine law imposes upon Defendant Phillips a duty of care which she violated, resulting in Evie's injuries. As the Law Court articulated in *Decambra v. Carson*, 953 A.2d 1163, 1165-6 (Me. 2008) (referencing and citing to *Fortin v. The Roman Catholic Bishop of Portland*, 871 A.2d 1208 (Me. 2005). an employer owes a duty of care to her employee in light of the existing "special relationship" between them (citing to restatement (Second) of Torts Sections 315(b) and 317):

To be actionable, a claim of negligence requires the existence of a duty of care. *See Trusiani v. Cumberland & York Distribs., Inc.*, 538 A.2d 258, 261 (Me. 1988). We have previously held that there is no general obligation to protect others from the actions of third parties, even where one knows the third party is or could be dangerous. *Bryan R. v. Watch-tower Bible & Tract Soc'y of N.Y., Inc.*, 1999 ME 144, ¶ 12. 738 A.2d 839, 844. [¶ 12] The only exception to this rule we have recognized is where there is a "special relationship" between plaintiff and defendant. *See Fortin v. The Roman Catholic Bishop of Portland*, 2005 ME 57, ¶ 39. 871 A.2d 1208. 1222. Specifically, we held that "if a plaintiff asserts the existence of facts that, if proven, establish a special relationship with a defendant in accordance with section 315(b) of the RESTATEMENT (SECOND) OF TORTS. an action may be maintained against the defendant for negligent supervision liability in accordance with section 317 of the Restatement." *Id.*

Section 315(b) provides that there is a duty to control the conduct of a third person to prevent him from causing harm to another if "a special relation exists between the actor and the other which gives to the other a right to protection." RESTATEMENT (SECOND) OF TORTS§ 315(b) (1965). Section 317 provides for a duty in a master-servant relationship, RESTATEMENT (SECOND) OF TORTS§ 317 (1965) .... [¶ 13] In *Fortin*, we held that special relationships for purposes of a negligence claim are grounded in the notion that a person or entity owed the plaintiff a fiduciary duty. 2005 ME 57. ¶ 26, 871 A.2d at 1218. A fiduciary duty will be found to exist where " 'the law will recognize both the disparate positions of the parties and a reasonable basis for the placement of trust and confidence in the superior party in the context of specific events at issue.' " *Id.* (quoting *Bryan R.*, 1999 ME 144. ¶ 20, 738 A.2d at 846).

In *Fortin*, the Law Court held that the concept of a "special relationship" for the purposes of a negligence claim was grounded in the notion that a person or entity owed the plaintiff a fiduciary duty. 871 A.2d at 1218. A fiduciary duty will be found to exist where " 'the law will recognize both the disparate positions of the parties and a reasonable basis for the placement of trust and confidence in the superior party in the context of specific events at issue.' " *Id.* (quoting *Re: Bryan R.*, 738 A.2d at 846 (Me. 1999). Here, Evie and Defendant Phillips were clearly in disparate power positions; both in contrast to each other and with respect to Jennifer Parady: Defendant Phillips was employer, daughter of the owners of the house with control of the house through power of attorney and aunt of Jennifer Parady. Evie was merely an employee. Defendant Phillips is liable for her failure to abide by her duty of care owed to Evie.

## CONCLUSION

For the reasons set forth above, genuine issues of material fact exist which are preclusive of summary judgment and Defendant Catherine Phillips is not otherwise entitled to judgment in her favor as a matter of law.

Accordingly, Defendant's Motion for Summary Judgment should be denied in its entirety.

Dated this 21st day of March, 2012.

<<signature>>

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#### Footnotes

- 1 Defendant's motion was initially dated February 15, 2012 but was subsequently amended by supplemental memorandum dated February 22, 2012.